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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. IAN KEITH LARSON, Defendant and Appellant.	C062406 (Super.Ct.No. CM018145)

In 2002, defendant Ian Keith Larson kicked in the door of his landlord's apartment and, using a metal baseball bat, threatened to kill her and forced her to orally copulate him. He explained to police that he believed his landlord and her husband were terrorists and that the President had instructed defendant to handle business.

In 2004, the trial court found defendant not guilty by reason of insanity of forcible oral copulation (Pen. Code, §§ 288a, subd. (c)(2), 667.61; further section references are to this code unless otherwise specified), assault with intent to commit rape (§ 220), assault with a deadly weapon and by means of force likely to produce

great bodily injury (§ 245, subd. (a)(1)), criminal threats (§ 422), and first degree burglary (§ 459). The court committed defendant to a state hospital for a maximum period of life.

In December 2008, defendant petitioned pursuant to section 1026.2 for a transfer to outpatient treatment on the ground that his sanity had been restored.

After a hearing, the trial court denied defendant's petition, finding that he continues to be a danger to the health and safety of others due to a mental defect, disease, or disorder. Thus, the court ordered defendant's return to Patton State Hospital for further treatment.

Defendant appeals.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and asks us to review the record and determine whether there are any arguable issues on appeal. (*In re Phoenix H.* (2009) 47 Cal.4th 835, 838, 843; *Conservatorship of Ben C.* (2007) 40 Cal.4th 529; *People v. Wende* (1979) 25 Cal.3d 436; *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1425.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant filed a supplemental brief, claiming the trial judge predetermined the outcome of the hearing, made an inappropriate comment, and failed to consider relevant case law. Finding that his claims lack merit, we shall affirm the judgment.

DISCUSSION

I

Defendant claims that during trial, "it was apparent to my lawyer and me" that the judge had "already made up his mind about the outcome of the trial." Defendant fails to explain, and the record does not support this claim.

II

Defendant next challenges the following as inappropriate: "[w]hile [defendant] was taking the stand," the judge asked him if he "would be scared if his bailiff pulled out his gun, and put it to the back of [defendant's] head." The record shows that defendant was not just taking the stand; he had already been testifying. Indeed, there had been over 25 pages of testimony at that point. The record also shows that defendant takes the court's comment out of context.

On cross-examination, defendant testified he had not forced or threatened the victim into orally copulating him; rather, she did so voluntarily after he broke down the door to her apartment and stood over her with a baseball bat, threatening to kill her. Defendant believed he did not need sex offender treatment. Under questioning by the court, defendant asserted the victim was under duress when she propositioned him.

The court's questioning continued:

"THE COURT: If I instructed my deputy to pull a gun out -- he has a firearm on him.

"THE WITNESS: I'm sure he does.

"THE COURT: And to point it at your head from where he's sitting and instruct you to get down on your hands and knees and he didn't touch you, would you comply?

"THE WITNESS: Yes, Sir.

"THE COURT: Okay. Do you think that woman might have been in the same situation?

"THE WITNESS: Yes, I do.

"THE COURT: All right. And do you think that makes any difference whether you touched her or not at the time that you demanded that she have oral sex with you?

"THE WITNESS: No, Sir.

"THE COURT: It doesn't make any difference at all, does it?

"THE WITNESS: No.

"THE COURT: Okay. You did in fact demand that she have oral sex -- that she perform oral sex with you?

"THE WITNESS: I asked -- I asked her and she --

"THE COURT: And you had a deadly weapon available to you, just not in your hand.

"THE WITNESS: Yes, Sir.

"THE COURT: You already smashed up the house pretty much?

"THE WITNESS: Yes, Sir.

"THE COURT: And you threatened to kill her?

"THE WITNESS: Yes, Sir.

"THE COURT: Okay. And you don't see in your mind -- and I'm just trying to get clarification here -- that you are guilty of a forcible sex offense?

"THE WITNESS: I do see that. I see that now.

"THE COURT: Okay. And you're not willing to undergo sex offender treatment because of that? Because you have perceived that the treatment isn't fit for you?

"THE WITNESS: I haven't perceived. I have been told by the people that run that unit.

"THE COURT: All right."

It is apparent the trial court was attempting to explain why there was no merit to defendant's claim that the victim voluntarily consented to orally copulate defendant. This was not error.

III

Defendant contends that in connection with his "petition of restoration of sanity," the court failed to consider relevant case law, namely, *Foucha v. Louisiana* (1992) 504 U.S. 71 [118 L.Ed.2d 437] (hereafter *Foucha*) and *People v. Galindo* (2006) 142 Cal.App.4th 531 (hereafter *Galindo*). Again, the record defeats defendant's claim. In argument, defense counsel referred to "some points and authorities in regard to the controlling law in this area," including *Galindo*, and the court indicated it had the brief and had "tried to review it earlier."

Foucha held an insanity acquittee could not be committed indefinitely unless the state showed he was both dangerous and mentally ill. (*Foucha, supra,* 504 U.S. at pp. 77-78 [118 L.Ed.2d at pp. 446-447].) Defendant claims the trial court failed to consider *Foucha*. However, *Foucha* was cited in defendant's petition, and defense counsel cited it in his brief, which the court had received and reviewed. In any event, *Foucha* is distinguishable. In that case, a panel of doctors recommended

Foucha be conditionally discharged, noting the lack of evidence of mental illness since his admission. (*Foucha, supra,* 504 U.S. at pp. 74-75 [118 L.Ed.2d at pp. 444-445].) In this case, defendant's treating doctor, Dr. Waheed Saed, testified that defendant was diagnosed as having polysubstance dependence, malingering, antisocial personality disorder; paraphilia had not been ruled out. Defendant needed continued treatment because he had been only partially compliant and would be a danger to the health and safety of others including himself under supervised treatment and was not ready for release. Thus, the ruling in *Foucha* is of no help to defendant.

Galindo involved a trial court's failure to consider whether a person had a serious difficulty in controlling dangerous behavior, a condition required for an extended commitment. (*Galindo, supra,* 142 Cal.App.4th at pp. 533, 538-539.) Defendant argues he has no such volitional mental illness, and the court failed to acknowledge *Galindo*. *Galindo* is distinguishable because it was an extended commitment case under section 1026.5. Here, defendant sought outpatient treatment pursuant to section 1026.2.

IV

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment (order denying outpatient treatment) is affirmed.

SCOTLAND, P. J.

We concur:

SIMS, J.

RAYE, J.